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No. 80-6298

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOIS MAE MILLS,
IN THE INTEREST OF
ARCHIE BURTON DUNCAN,
A CHILD, *Appellant,*

v.

DAN HABLUETZEL, *Appellee.*

APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS

APPELLEE'S MOTION TO DISMISS AS MOOT

LOLA L. BONNER
Attorney at Law
P.O. Drawer 908
Rockport, Texas 78382
512/729-2353
Counsel of Record

JOHN H. FLINN
Attorney at Law
P.O. Box 1112
Sinton, Texas 78387
512/364-4721
Counsel for Appellee

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Now comes Appellee herein and moves that the appeal heretofore filed in this cause be dismissed as moot and as grounds therefor would show the Court as follows:

I.

This appeal challenges the constitutionality of the Paternity statute of the State of Texas, which contained, as it was first enacted, a limitation of one year from the date of birth of the illegitimate child within which to file such paternity proceedings.

II.

After such appeal was instituted, the Sixty-Seventh Legislature of the State of Texas, amended Article 13.01, Texas Family Code, (the paternity statute) to enlarge the time for filing suit to establish paternity from one year to four years. The Texas Legislature directed that the change or amendment of the limitation period take effect September 1, 1981. It neither directed nor negated that the statute be given retroactive effect,

although the same Legislative Bill did make specific provision for the effective dates of other amendments encompassed therein. (Appellee's Brief. App. 4a)

It appears likely that the Texas Courts will give retroactive effect to the new statute inasmuch as the change is remedial or procedural in nature and would not affect a vested right of a defendant. The right to establish paternity was granted illegitimates in 1975 when the Texas Legislature enacted Article 13.01, Texas Family Code. The recent change merely expands the time in which to establish paternity. Under Texas holdings, the enlargement of the time within which to bring a paternity suit will likely be considered procedural or remedial in nature and giving retroactive effect thereto will not, therefore, be in

violation of Article 1, Section 16, of the Texas Constitution. Exxon Corporation v. Brecheen, 526 S.W. 2d 519 (Tex. S. Ct. 1975); Ex Parte Abell, 613 S.W. 2d 255 (Tex. S. Ct. 1981)

Two Texas Courts agree that statutes of limitation pertain to remedies and not to substantive rights. Texas Department of Human Resources v. Chapman, 570 S.W. 2d (CCA Dal, 1978, Ref. N.R.E.) and In Interest of Miller, 605 S.W. 2d 332 (CCA Ft. Worth, 1980, Writ Granted)

III.

If retroactive effect is to be given the new law, all illegitimate children born in Texas after September 1, 1977, will be affected and protected by the change. Those born between September 1, 1975, and September 1, 1977, would be governed by the one

year statute of limitations.

IV.

It is the position of the Appellee that before this Court should rule on the constitutionality of the one-year statute, it should first allow the State Courts of Texas to determine whether retroactive effect will be given to the new law.

V.

It is likewise the position of Appellee, that the change made by the Sixty-Seventh Legislature of the State of Texas, renders this appeal moot, because the State has removed the objection of which Appellant complains.

This is not a case that is "capable of repetition, yet evading review" Dunn v. Blumstein, 405 U.S. 330. It is not one in which a voter has been denied the right to

vote in an election long since held pending the appeal, but with rights of future voters undetermined. Nor is it one in which a complaining divorce litigant had acquired residency requirements by the time an appeal was perfected. Sosna v. Iowa, 419 U.S. 393. It is, instead, one in which all paternity suits in Texas may now be brought within four years from date of birth of an illegitimate in lieu of one year from such birth.

V.

The Texas Courts have consistently upheld the constitutionality of the one year limitation in paternity suits. Texas Department of Human Resources v. Chapman, 570 S.W.2d (CCA Dal, 1978, Ref. N.R.E.) The Supreme Court of Texas has granted writ of error in the only cases which held the statute unconstitutional

and has, of the date of preparation of this motion, not rendered a decision in same. In Interest of Miller, 605 S.W. 2d 332 (CCA, Ft. Worth, 1980, Writ Granted)

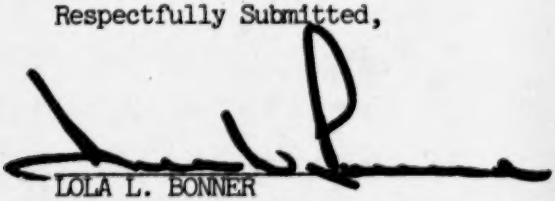
The Fort Worth Court of Civil Appeals found the statute unconstitutional on the ground that it applies only to suits for paternity with no provision being made for suits for maternity.

It would appear, that because of the recent changes in the statute of limitations, this case should be rendered moot or remanded pending determination, by the Texas Courts, of the issue of retroactive application of such recent enlargement of the time for bringing paternity suits.

WHEREFORE, Appellee prays judgment of this Court that the appeal be rendered moot

or alternatively that the case be remanded until the Texas Court can decide upon the constitutional issue of retroactive effect to be given to the new law.

Respectfully Submitted,



LOLA L. BONNER
Attorney at Law
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COUNSEL OF RECORD

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Attorney at Law
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